



DATE: January 6, 1997

CASE NO: 96-ERA-29

In the Matter of:

MICHAEL E. MURRAY,
Complainant,

v.

ARIZONA PUBLIC SERVICE CO.,
Respondent.

**RECOMMENDED DECISION AND ORDER APPROVING
SETTLEMENT AND DISMISSING COMPLAINT WITH PREJUDICE**

This matter arises under the employee protection provision of the Energy Reorganization Act of 1974 (the "Act" or "ERA"), 42 U.S.C. § 5851, and the regulations promulgated thereunder at 29 C.F.R. Part 24 (1994). Complainant, Michael E. Murray, has appealed the determination of Susan P. Nern, Associate District Director, dated June 12, 1996, dismissing Complainant's complaint against Arizona Public Service Company, Respondent.

Procedural History

This matter was assigned to the undersigned administrative law judge on July 8, 1996, for the purpose of conducting a formal hearing and issuing a recommended decision and order pursuant to 29 C.F.R. §§ 24.5, 24.6 (1994). Pursuant to due notice, this matter was set for hearing on Tuesday, October 29, 1996, at Phoenix, Arizona.

On September 9, 1996, Respondent filed its "Motion to Dismiss," along with a Memorandum of Points and Authorities and exhibits in support thereof. Complainant's response to this motion, as well as his own "Application for Default" were filed on September 19, 1996. Both Respondent's Motion to Dismiss and Complainant's Application for Default were denied in an order issued by the undersigned on September 23, 1996.

On October 9, 1996, this office received Respondent's "Motion for Summary Decision." Complainant's response was subsequently filed on October 21, 1996. In an order dated October 10, 1996, the undersigned acknowledged receipt of Respondent's motion. Based

upon the proximity of the hearing date, the undersigned informed the parties that argument on this motion would be received at the beginning of the hearing and that a ruling thereon would be rendered immediately thereafter. The order further rescheduled the formal hearing for Monday, October 28, 1996, and also advised the parties as to the Office of Administrative Law Judges' settlement judge procedure contained at 29 C.F.R. § 18.9(e) (1994).

On October 21, 1996, the parties filed a "Joint Motion to Continue Hearing" via facsimile. Attached thereto was the parties' "Joint Stipulation Regarding Appointment of a Settlement Judge," sent to Chief Administrative Law Judge John M. Vittone. Based upon this request, the undersigned issued an order on October 23, 1996, striking the hearing date of October 28, 1996, and rescheduling this matter for hearing on February 24, 1997.

In an order dated October 24, 1996, Chief Administrative Law Judge John M. Vittone appointed Administrative Law Judge Michael Lesniak as the settlement judge, pursuant to 29 C.F.R. § 18.9(e).

On November 22, 1996, this office received notice from Judge Lesniak's office, via telephone, that the parties were able to reach a settlement in this matter. This was confirmed by a subsequent telephone call from Respondent's counsel on December 17, 1996. The parties' "Joint Motion for Recommended Decision and Final Order Approving Settlement and Dismissing Complaint with Prejudice," with an attached "Settlement Agreement," was filed on December 18, 1996.

The Settlement Agreement

The parties Settlement Agreement, which is attached to the joint motion, appears to have been executed by Complainant and Respondent's Senior Vice President. The undersigned has reviewed the entire agreement, including Appendices "A" and "B" thereto, and finds that it is fair, adequate and reasonable for all parties. As such, the undersigned recommends that the agreement be approved without modification. The undersigned further recommends that based upon the agreement, the above-styled matter should be dismissed with prejudice.

An integral part of the settlement is the parties' agreement that the terms thereof shall remain confidential, the parties agreeing that neither will disclose the same except in limited circumstances. Furthermore, the cover letter from Respondent's counsel dated December 17, 1996, indicates that the agreement and its terms constitute "confidential commercial and financial information." Respondent, with the agreement of Complainant, therefore asserts its rights to notification prior to any disclosure based upon a request filed under the Freedom of Information Act (the "FOIA"), as amended, 5 U.S.C. § 552. See 29 C.F.R. § 70.26 (1994).

The parties' joint motion includes the affidavit of Ms. Nancy C. Loftin, Respondent's Vice President, Chief Legal Counsel and Secretary. Ms. Loftin's sworn statement indicates that the settlement agreement and its terms include nonpublic commercially sensitive information and financial information, the disclosure of which "would cause substantial competitive harm to [Respondent]." Accepting this sworn statement, the undersigned finds that the parties' Settlement Agreement, and the terms thereof, constitute confidential commercial and financial information and that Respondent is legally entitled to predisclosure notification, as provided under 29 C.F.R. § 70.26 (1994).

RECOMMENDED ORDER

Based upon the foregoing, and pursuant to 29 C.F.R. § 24.6 (1994), the undersigned **HEREBY RECOMMENDS** that the Administrative Review Board, acting under the delegation of authority from the Secretary of the United States Department of Labor, issue a final order approving the parties' Settlement Agreement and dismissing the above-styled matter with prejudice.

Entered this ____ day of January, 1997, at Long Beach, California.

SAMUEL J. SMITH
Administrative Law Judge